The Central Law Journal.

ST. LOUIS, JULY 30, 1880.

ULTRA VIRES.—I.

CERTAIN CASES WHERE THE DEFENSE OF ULTRA VIRES IS INADMISSIBLE IN ACTIONS AGAINST CORPORATIONS.

A contract of a corporation, as a general rule, when clearly proven to be *ultra vires*, is void and can not be enforced against the corporation. In such a case the plea of *ultra vires* is a good and complete defense; there are, however, exceptions to this general rule, and the later rule in England and this country is that the act of the corporation, though absolutely *ultra vires*, is not necessarily void in all cases. We propose to examine two of the exceptions to the general rule where the defense of *ultra vires* is inadmissible.

When a contract has been duly made by a corporation, if not wholly executed, the defense of *ultra vires* is inadmissible to an action against the corporation, where all the shareholders have acquiesced in its performance; that is to say an act, admittedly *ultra vires*, is not necessarily void, but is capable of ratification by the shareholders, unless contrary to public policy. This principle is true not only of actions by strangers against corporations, but also where a shareholder seeks relief; and a shareholder who would have been entitled to relief against the execution or continuance of an unauthorized contract, has been refused his remedy on the ground that his application came too late, his laches having lost him the right he originally possessed. It is true that a majority, however large, can not bind a single dissenting shareholder, but he must ask for his relief in time, and must not acquiesce in the action of the corporation too long, or be otherwise debarred.

The principle is well stated by Sir W. Page Wood, V. C., afterwards Lord Hatherley, in Hare v. Railway Co.[1] In that case the plaintiff filed a bill to set aside an agreement between two groups of railway companies to divide the profits of the whole traffic in fixed proportions. The plaintiff, as shareholder in one of the companies, had, with full knowledge, received his profits as shareholder under the agreement; he then purchased a share in the other company, and filed his bill against the latter. "With respect to the point of acquiescence, I agree with the argument of Sir H. Cairns, that the reported cases on the subject of acquiescence are of a different description from this. Where an act is done once for all—as the irregular expenditure of money, for example—this defense rests on a different basis. Graham v. Birkenhead R. Co.,[2] is the only case which, from this point of view, bears at all upon the present. There something did remain to be done to carry out the transaction, but still a counter equity existed. Here it is not a question of acquiescence in an act which has been completed, but whether a plaintiff, after accepting money in the shape of increased dividends under an agreement—which is more than a mere submission to the will of the majority of the shareholders—can turn round and take the opposite view, and ask that the agreement may be set aside. This consideration would have made me pause before granting the prayer of the bill, even if I had more doubt than I have as to the legality of the contract. Upon the question of legality, however, without the aid of other considerations, I must dismiss the bill." The same principle is stated in the late case of Phosphate of Lime Company v. Green.[3] This was a common law action by the company against Green, the ground of action being that the company had canceled four hundred shares belonging to him, an act alleged to be *ultra vires*, as being forbidden by the articles of association. Brett, J., held that the act was *ultra vires*, being expressly forbidden by one of the articles, and stated that the only question was whether the act of the directors in canceling these shares had been ratified by the company. "Now, in order to establish a case of ratification, it seems to me that it was not necessary to prove absolute knowledge on the part of every shareholder. As is pointed out by Lord St. Leonards, in Spackman v. Evans,[4] it was not necessary to show that

[1] 2 Johns. & Hem. 80, 121 (1861).

[2] 2 Mac & G. 146.

[3] L. R. 7 Com. Pl. 43, 62, 63 (1871).

[4] L. R. 3 H. L. 222.

every shareholder had actual notice. 'It is said,' he observes, 'that the absent shareholders in this case are not bound by the arrangement, unless the appellant can prove that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In Brotherhood's Case,[5] it was held that they had notice—not that in point of fact such notice was proved.' It is impossible to prove that every shareholder had notice, or such a knowledge of the facts as amounts to notice. It is sufficient to show that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction. I think there was such evidence here." The authorities in the United States are to the same effect, of which one is sufficient for illustration. In Erie Railway Co. v. D. L. & W. & M. & E. R. Co.,[6] complainants filed a bill to restrain defendants from making a certain connection, alleging among other things, that the branch road which the defendants proposed to operate in connection with their main road, had been built without any authority from the legislature, as to which the defendants were therefore mere trespassers. "My reason" said Chief Justice Beasley, "for thus postponing all ultimate consideration of the legal status of this branch road of the defendants is because, on the concession even of its unlawfulness, I do not think the complainants are in a position to challenge such status before this court. In my opinion the complainants have lost their right by their own acquiescence and laches. * * * * I know of no principle of equity better settled than the rule applicable to this matter, nor does it seem possible for any facts to be more obviously within the reach of such principles. The case is this: The complainants claim the exclusive right to a railroad between the cities of Patterson and Hoboken. They stood by and saw the defendants build, within sight of their own road, a rival parallel road, this whole distance, at a cost of many millions of dollars. They expressed no dissent and gave no warning, and finally they sold for a large sum of money a part of their own land to help the construction of this road, which, it is now claimed, has no rightful basis whatever. In my estimation these facts are amply sufficient to debar the complainants from ever calling in question the lawfulness of this structure, which has been erected, not only through the passiveness of the complainants, but by their active assistance. * * * * If the complainants intended to contest the right of the defendants, why was not prompt action taken before this enormous outlay was made? Fair dealing and good conscience obviously required the complainants to assert their right at the outset, if it was designed ever to do so." The view taken by the chief justice in this case was subsequently affirmed by him in the later case of the Delaware, L. and W. R. Co. v. Erie Railway Co.[7]

It is to be observed that in acts *ultra vires*, the act may be merely in excess of the powers of the corporation as given by its charter, that is, the act may not be actually forbidden, but, on the other hand, the capacity to perform it may not have been given by the legislature to the corporation.

In England the rule appears to be that, where the legislature has prohibited the doing of an act by an incorporated company, any contract to do it is illegal, and the illegality may always be set up as a defense, though every shareholder had assented. Lord Blackburn enunciates this rule in Taylor v. Railway Co.[8]

Riche v. Ashbury Railway Co.,[9] is an instructive case as illustrating the English law on the subject. In it Lord Blackburn says: "The Ashbury Company are a company incorporated under the Companies' Act; * * the memorandum of association states * * the object for which the company is established. * * * * The company is a corporation, and it is a partnership for trading purposes, for the objects for which the company is established." "The question on which there is doubt and difficulty is, whether in the case of a company incorporated under the Companies' Act, *supra*, the unanimous shareholders can ratify a contract made in the

[5] 31 Beav. 365.
[6] 21 N. J. Eq. 283 (1871).
[7] Id. 301.
[8] L. R. 2 Exch. Ca. 379.
[9] L. R. 9 Exch. 254.

name of the company, but beyond the authority of those who made it. That question must ultimately depend on the true construction of the act of Parliament. Had the legislature thought fit to enact in clear language either that all contracts, made by or on behalf of" the company so incorporated "beyond the scope of the objects for which it was established, should be absolutely void, or expressly to enact that contracts, though beyond the scope of those objects, should be valid if either previously authorized, or subsequently ratified by all the shareholders, our task would simply be to carry out that expressed intention of the legislature. But there is no express enactment, either one way or the other." "My late Brother Channell, in his judgment in the case below says: 'In some of the earlier cases quoted in the argument, in which questions were discussed relating to contracts *ultra vires* of the companies making them, the question was treated as one of illegality. Whatever may be the case with regard to companies which have been specially incorporated by Parliament for a special purpose, and which use the powers so obtained for other purposes, it seems clearly settled by the more recent authorities that in the case of companies, such as that in the present case, the persons constituting the company, that is to say the shareholders, may bind themselves in their corporate capacity, by their individual assent to contracts not authorized by the memorandum of association. * * * The objection to such a contract is not that it is illegal and therefore unenforceable, but simply that it is unauthorized by the body whom it purports to bind.' * * * * It is, I think, too much to say that these recent cases clearly settle the point. Instead of that these cases clearly settle that the law is as my Brother Channell says, I only say that I *think* them authorities to that effect, and that I *think* such is the law." This was in 1874. See the cases referred to in this case.

In the United States a distinction has been taken, in the later cases, between acts expressly or impliedly forbidden in the charter, for the sole benefit of the corporation prohibited, and which are not, though *ultra vires*, void as against one dealing with the corporation in good faith, and acts void as *mala in se*, to enforce or ratify which is against public policy; and consequently a different view has been taken in this country, from the view expressed in the above cited English cases. The question here is: "Did the legislature not only prohibit the act, but declare further that the prohibited act shall be void?" In National Bank v. Matthews,[10] Swayne J., admitted that §5136, Rev. Stat., did not in terms prohibit a loan upon real estate, but the implication to that effect was clear, for "what is so implied is as effectual as if it were expressed." He then, taking the distinction stated above, said that conceding the loan to have been made upon real estate securities within the prohibition of the statute, "the consequence insisted upon, by no means necessarily follows. The statute does not declare such a security void. If Congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision." The same result is reached in Stephens v. Monongahela National Bank,[11] by the Supreme Court of Pennsylvania, in 1879, where, admittedly, the act done by the bank was prohibited, and was also a direct attempt to evade §5200 Rev. Stat. In Bissell v. Railway Co.,[12] Seldon, J., did, indeed, express a different opinion, and differed from the grounds of the decision given by Comstock, P. J.; but the opinion of the former is no longer recognized in New York, while that of the latter has been frequently approved.[13]

There are cases in Maryland[14] in which a different result has been reached; but the Maryland decisions on this question are admittedly in conflict with those of all the other States, and the case of Pearce v. Railway Co.,[15] does not appear to have been cited later than in a case in 23 How., and is opposed to the rulings of the cases in the Federal Courts.

[10] 8 Otto, 625; 8 Cent. L. J. 131.
[11] 7 W. N. 491.
[12] 22 N. Y. 289.
[13] See Whitney Arms Co. v. Barlow, 63 N. Y. 62.
[14] Pearce v. R. Co., 21 How. 441; Steam Navigation Co. v. Dandridge, 8 Gill & J. 248; Weckler v. Bank, 42 Md. 581.
[15] *Supra*.

A MAN AND HIS NAME. III.*

The question how far a patentee is entitled to restrain other manufacturers and the public generally from using his name to describe the article made under the patent stands upon a separate footing, and depends upon the general principle that one trader is not entitled to monopolize words which are properly descriptive of a particular article, or principle of manufacture, or process of construction, and which the public would naturally employ for the purpose of pointing out to what article of commerce, or principle or process they wish to refer.

The general principle is clearly set out in the judgment of Vice-Chancellor Malins in Raggett v. Findlater, 22 W. R. 53, L. R. 17 Eq. 29, the "Nourishing Stout" case, where he said—"It is of the highest importance that, on the one hand, every protection should be given to trade-marks when fairly and properly used, and when used within just limits; and, on the other hand, it is of great importance that by the use of a particular word or anything which may be called a trade-mark, the right should not be unduly extended so as to infringe on the right of traders to call their article by a quality they possess, or to give an undue protection to any man who happens to use a particular word."

And with no less distinctness has the same principle been laid down in America. Thus, in Caswell v. Davis, 58 N. Y. 223, Folger, J., said, in the New York Court of Appeals: "There is no principle more firmly settled in the law of trade-marks than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect, nor does it matter that the form of words or phrases adopted also indicates the origin and maker of the article. The combination of words must express only the latter. It is the result of all the decisions that known words and phrases indicative of quality and composition are the common property of all mankind. They may not be appropriated by one to mark an article of his manufacture, when they may be used truthfully by another to inform the public of the ingredients which make up an article made by him." So in Town v. Stetson, 3 Daly, 53, a judge of the New York Court of Common Pleas said that, "no manufacturer can acquire a special property in an ordinary term or expression, the use of which, as an entirety, is essential to the correct and truthful designation of a particular article or compound." So again, in Osgood v. Allen, 1 Holmes, 185, another judge laid down that "a genuine name, or a name merely descriptive of an article of trade, or its qualities or ingredients, can not be adopted as a trade-mark, so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products can not become the subjects of exclusive use; for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products." And many other statements of the law, both by English and American judges, might be cited to the same effect.

It is obvious that the names of patentees are within the rule thus expounded; for every patent is necessarily taken out for some new invention or improvement, though the invention or improvement is frequently, no doubt, of a somewhat shadowy nature, and the patent is universally described by the name of the patentee, as "Bessemer's Patent," "Newton's Patent." The article manufactured in accordance with the patent then acquires a name derived from the name of the patent process, thus, "Steel manufactured according to Bessemer's Patent," or "Bessemer's Method," or, shortly, "Bessemer Steel." The result is that the name "Bessemer," as applied to steel, by no means indicates steel manufactured at the works of the patentee, or under his direction, but indicates that the steel has passed through a certain process of manufacture, at whatever establishment it may be, and has so acquired the particular aggregation of qualities which steel so manufactured is known to possess. The name, in fact, is descriptive of quality. And there may, of course, be cases, especially where the manufacture has been kept a secret, in which the name of an inventor of a new manufacture may come to be descriptive of the manufactured article, even though no patent was taken out. Probably no patent was ever granted to the originator of "James' Powders." But in such cases the name is, of course, not so necessarily descriptive as where there is or has been a patent.

When the name of an inventor or patentee has thus become the name of the article, there would clearly be a double injury inflicted on the public, if they were debarred from describing the article by the name which properly belongs to it. For not only would other manufacturers of the same article be unable to convey to the minds of their customers that their goods were the exact equivalent of those which had been made under the patent by the original inventor, but purchasers would be deceived by two or more different names being in use to denote the same article. Lord Hatherley, therefore, in Young v. Macrae, 9 Jur. N. S. 322, gave it as his opinion that where a patentee's name had been usually applied to particular goods manufactured by him, not because they were of his make, but because he, as patentee, could alone make them, after the expiration of the patent any one might use the name; and, further than this, that where a patent was for a means of getting at a new natural product, which had for the first time received a name, any one might use the name, even during the continuance of the patent, if he could invent a new means of getting at the natural product without infringing the patent. The name there in issue was "Paraffin Oil," but it seems that the same principle would have applied if the oil had been given out to the public by the patentee as "Young's Oil." In Liebig's

*Continued from *ante*, p. 27.

Extract of Meat Company v. Hanbury, 17 L. T. N. S. 298, it was held that the name "Liebig's Extract of Meat" had become descriptive, and could be used by any one who was in possession of the recipe. So "Condy's Fluid," in Condy v. Mitchell, 26 W. R. 269. On the other hand, in Wilkie v. McCulloch, 2 S. 413, the Scotch Court of Session granted an interdict to restrain the use of the name "Wilkie" on ploughs, notwithstanding a defense that the name was used to indicate a class of plough, and not the manufacture of the plaintiff. Here there was no patent. In Tucker Manufacturing Company v. Boyington, 9 U. S. Off. Pat. Gaz. 455, it was decided that, on the expiration of Tucker's patent for beds, the right to use the name "Tucker's Spring Bed," and to publish a representation of the bed, had become public and common property. And in *In re* Richardson, 3 U. S. Off. Pat. Gaz. 120, a registration case, a similar conclusion was arrived at with respect to the name "Richardson's" as applied to a leather-splitting machine.

In the case of *In re* Consolidated Fruit Jar Company, 14 U. S. Off. Pat. Gaz. 269, registration was refused to the name "Mason" as applied to seven-inch jars made under an existing patent, since, although the inventor, or those claiming through him, had the sole right to make the article and call it by its special name during the existence of the patent, at the expiration of the patent the article would be thrown open to manufacture by independent firms, who would be entitled to apply the appropriate name to the jars they made. See, however, *Ex parte* Consolidated Fruit Jar Company, 16 U. S. Off. Pat. Gaz. 679, in which an opposite conclusion was arrived at.

On looking into the point, it certainly appears to be reasonable in every way that the mere fact of a name having been exclusively used by a patentee during the continuance of his patent, should not be sufficient of itself to give him an exclusive right in the name as long as he keeps up the manufacture; for, as was well pointed out by Mr. Justice Fry, in Linoleum Manufacturing Company v. Nairn, 26 W. R. 463, L. R. 7 Ch. D. 834, where the word "Linoleum" was in issue, "until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name, as showing that the manufacture of one person is indicated by it, and not the manufacture of another." If after the expiration of the patent the patentee were to continue to use the name, and no one else were to adopt it, a different state of circumstances would arise. But apart from some such independent user, "protection," to cite the present Master of the Rolls in Cheavin v. Walker, L. R. 5 Ch. D. 850, "only extends to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent, to obtain a further protection by using the name of his patent as a trade-mark." The name there held by the Court of Appeal to have become *publici juris* was "Cheavin's" water filter, and Lord Justice James added: "It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world." In very much the same language he had already said, speaking of the "Wheeler & Wilson" sewing machines, Wheeler & Wilson Manufacturing Company v. Shakespeare, 39 L. J. Ch. 36, while vice-chancellor: "A man can not prolong his monopoly by saying, 'I have got a trade-mark in the name of a thing which was the subject of the patent.' "

It is, of course, possible that, though the name is applied to a certain description of articles made under a certain patent, it may also be applied to other articles of the same description, but made on a different principle or by a different process, which has formed the subject of one or more other separate patents of the same patentee. This is, of course, a question of evidence in each case, and it is for the court or jury to decide on the facts whether one principle or one set of characteristics sufficiently runs through all the differing articles which pass by the same name, for the name to be susceptible of common use as describing that particular principle or set of characteristics. If the verdict is in the affirmative, then the name will be open to the use of all persons whose manufactures embody the principle or set of characteristics in question; if otherwise, the application of the name to a widely differing variety of objects can hardly have any other result than to ascribe to the goods a common manufacturing origin, in which case the name is the property of the manufacturer. This was the question at issue in the "Singer" sewing machine cases, in which a great variety of sewing machines had been patented under the same name, very dissimilar in external appearance, and less similar in construction to one another, as the evidence showed, than the various types were to different other makes of machines. When the case of Singer Manufacturing Company v. Kimball, 11 Macph. 267, came before the Scotch Court of Session, a decision was given for the plaintiffs on the ground above indicated. In Singer Manufacturing Company v. Wilson, 24 W. R. 1023, L. R. 2 Ch. D. 434, the Master of the Rolls and Court of Appeal did not decide this point, coming to a decision adverse to the plaintiffs upon a previous point. The House of Lords, however, (26 W. R. 664, L. R. App. Cas. 376), reversed the decision on this point, and sent the case back to be tried out in the court below. This particular case went no farther, owing to the pecuniary collapse of the defendants; but in Singer Manufacturing Company v. Loog, another action begun by the plaintiffs for the purpose of obtaining a decision on the undetermined point, Vice-Chancellor Bacon (July 24, 1879) came to a conclusion favorable to the plaintiffs, as the Court of Session had already done.

When the name of an inventor has become a good trade-mark—that is to say, when it has come

to be recognized as indicative of the manufacturer, by exclusive user, either after the expiration of the patent, or when no patent has been taken out for the invention—the name partakes of the nature of other trade-marks in this respect also, that it is capable of protection by persons to whom it has come during the lifetime or after the death of the inventor. In James v. James, 20 W. R. 434, L. R. 13 Eq. 421, Lord Romilly was of a different opinion, considering that when a person had discovered a valuable invention and had not patented it, anyone who had discovered the ingredients might sell those ingredients, and might use the name of the person who had discovered them, after his death, but not in his lifetime; and he held that the name of an unpatented invention, "Lieutenant James' Horse Blister," had become common to the public on the death of Lieutenant James, though it had previously been private property. Very recently, however, in Massam v. Thorley's Cattle Food Company, *supra*, this view met with disapprobation in the Court of Appeal. Vice-Chancellor Malins had there considered himself bound, by James v. James, to hold that the name "Thorley's Cattle Food" had become *publici juris* on the death of Thorley, but the lords justices were of opinion that the name of the unpatented and secret invention, not having been of common right during Thorley's lifetime, had not become so on his death, but had passed to his executors, and they restrained the use of the name by a company formed by another Thorley, a brother of the deceased inventor.

CONVERSION OF BUILDINGS BY OWNER OF REALTY.

DOLLIVER v. ELA.

Supreme Judicial Court of Massachusetts, November Term, 1879.

Where the defendant, the owner of real estate, agreed with B that the latter might erect buildings upon said estate, and that they were not to be the property of the defendant, but that B should have the right to remove them at any time, and B thereafter sold said buildings to C, by bill of sale not recorded, and the defendant, at B's request and without notice of said sale to C, subsequently sold said estate to an innocent purchaser without notice of C's title, it was *held* that the defendant was liable to C, in an action of tort in the nature of trover, for the value of the buildings.

Action of tort in the nature of trover, tried by the court without a jury. The court found no conversion proved as to any of the items, except as to a building, and two small outbuildings connected therewith, used as a brewery for beer, which the plaintiff claimed was, as against the defendant, to be treated as personal property.

It appeared that the buildings were erected by one Ashworth, upon land of the defendant, in such a manner as to become a part of the realty, if not disannexed by contract in the eye of the law, and that they were never physically severed from the realty up to the date of the writ. At the time of their erection, which was in the spring of 1868, the said Ashworth was in possession of the land under the following circumstances. Ashworth had been previously a tenant of defendant under a written lease, and had erected a brewery which had been destroyed by fire. On the 17th of February, 1868, the said lease was canceled by mutual consent, and a warranty deed was made and signed by the defendant, conveying the premises for a price agreed to said Ashworth, and at the same time Ashworth executed a mortgage back to defendant to secure a part of the purchase money.

The mortgage deed was delivered to the defendant, but the warranty deed was not delivered; but the defendant gave Ashworth, as a part of the same transaction, a written agreement, by which he agreed to deliver said deed upon receiving that portion of the purchase money not covered by the mortgage. Said money was never paid, nor said deed delivered. Ashworth continued to occupy the premises under an agreement to pay defendant, quarterly, a sum equal to the quarterly interest upon the purchase money. The court found, that prior to the erection of the buildings in question it was understood and agreed, but not in writing, between defendant and Ashworth, that they were not to be the property of the defendant, but that he, Ashworth, should have the right to remove them at any time.

While Ashworth was in possession of the premises as aforesaid, on October 3, 1868, he conveyed the said buildings, by a bill of sale in common form and under seal, to the plaintiff's intestate for a valuable consideration, and she took possession. April 7th, 1869, the defendant, at the request of Ashworth, conveyed the said land, by warranty deed in common form, to one King; and thereupon, and as a part of the same transaction, said agreement for a deed from defendant to Ashworth was given up, and Ashworth gave to the defendant a release of said land, with all "the privileges and appurtenances thereto belonging." The court did not find that at the time of said deed to King the defendant knew of said conveyance from Ashworth to plaintiff's intestate. The said deed to King made no mention of the buildings, but described the land by metes and bounds, and the *habendum* clause contained the usual phrase, "with all the privileges and appurtenances thereto belonging." The defendant never had actual possession of the premises from February, 17th, 1868, down to October, 1872, when he entered to foreclose a mortgage of the estate given by King to him.

The defendant asked the court to rule: First, that no title to said buildings, while annexed to the realty, could pass to plaintiff's intestate, as against the defendant, by said bill of sale. Second, that this action of trover would not lie against the defendant upon the evidence, even though the plaintiff's intestate had the right of removal. Third, that there was no evidence which would authorize a finding that defendant converted said buildings. But the court refused so

to rule, but held, as matter of law, that as against defendant, the title to said buildings did pass to plaintiff's intestate by the bill of sale aforesaid; that this form of action would lie upon the facts; and that said deed from defendant to King operated as a conversion of said buildings, enabling King, a purchaser without notice, to hold the same as against the plaintiff's intestate, as a part of the realty. At the request of the defendant, the case was reported for the consideration of the Supreme Judicial Court.

J. C. Sanborn and *W. S. Knox*, for plaintiff; *E. T. Burley*, for defendants.

MORTON, J., delivered the opinion of the court:

It has been decided by this court in several cases that if a man puts a house, or other buildings, upon land of another, under an agreement with the owner of the land that he may remove it, the building remains his personal property. He may lose his right to it, if the land is sold to an innocent purchaser without notice of the agreement. He can not set up his title against such innocent purchaser whom he has misled by permitting the building to be attached to and apparently a part of the realty bought by him. But as against the original owner of the land, and all persons taking under him with notice, the building never becomes a part of the realty, but remains personal property, and he, or a purchaser from him, may maintain replevin or trover to recover it or its value, even while it remains upon the land and apparently a part of the realty. Hunt v. Bay State Iron Co., 97 Mass. 279; Curtis v. Riddle, 7 Allen, 185; Hinckley v. Baxter, 13 Allen, 139; Brooks v. Prescott, 114 Mass. 392; Hartwell v. Kelly, 117 Mass. 235.

In the case at bar it is found as a fact, that Ashworth put the buildings in controversy upon the land of defendant under an agreement, "that they were not to be the property of defendant, but that he, Ashworth, should have the right to remove them at any time." By virtue of this agreement, they never became a part of the defendant's real estate, but remained the personal property of Ashworth. He had the right to sell them to the plaintiff's intestate, and she can maintain this action of tort in the nature of trover against the defendant, if he converted them to his own use.

The question whether, upon the facts proved, the defendant was guilty of a conversion, is not free from difficulty. To understand it, it is necessary to refer to the facts which show the relations between the parties. The defendant had agreed to give Ashworth a deed of the land upon his paying a part of the price, and giving a mortgage for the balance. Ashworth was thus the equitable and beneficial owner of the land, and he was in the occupation of it under an agreement to pay the defendant a sum equal to the interest upon the price. While thus in possession, he sold the buildings by a bill of sale not recorded to the plaintiff's intestate. Afterwards Ashworth requested the defendant to convey the land to one King, which the defendant did by a warranty deed in the common form, which made no mention of the buildings. At the same time the defendant's agreement to convey to Ashworth was given up, and Ashworth gave to the defendant a release of the land "with all the privileges and appurtenances thereto belonging." At the time of this transaction the defendant did not know of the sale to the plaintiff's intestate. But he knew that, by virtue of the agreement he had made, the buildings remained personal property, and he is presumed in law to have known that the effect of the sale of his land to King would be to give him a title to the buildings, and thus deprive the owner of all right to them. His sale to King was the exercise of dominion over the property inconsistent with the right of the plaintiff's intestate, who was the owner. It is similar to the common case, where a man innocently sells and appropriates to his own use the property of another, in ignorance of the ownership. Such an appropriation, though made without any intent to wrong the owner, is in law a conversion.

We are, therefore, of opinion, that the rulings at the trial in the Superior Court were correct.

ACCIDENT—WHEN RAILROAD NOT LIABLE FOR.

HALLIHAN v. HANNIBAL, ETC. R. CO.

Supreme Court of Missouri, March 22, 1880.

H, a car repairer of another railroad passing over defendant's track was requested by a car repairer of the latter to look at a car standing on defendant's track, and while attempting to comply with the request was killed by a freight train switched in the usual way and not coming very fast, striking the car which was being examined and driving it over him. There was nothing in the evidence to show that defendant was aware of the perilous position in which H had placed himself, or that if aware the injury could have been prevented. *Held*, that defendant was not liable.

SHERWOOD, C. J., delivered the opinion of the court:

Action for damages for injuries resulting in death of plaintiff's husband. Plaintiff had judgment for $5,000.

The yards of defendant where the accident occurred are about ten acres in extent, and covered with a net-work of tracks where the switching of cars and the making up of trains was going on almost continuously during the busy season. It seems to be the customary manner of switch'ng cars in the yards of defendant for the engine to take the cars up towards the bridge, then "kick" them off, when they are cut off by yardsmen to run on the different tracks wherever wanted; and cars can not be coupled at all without the cars switched have acquired a sufficient momentum to strike the cars to which they are to be coupled with a considerable degree of force; enough to move the cars with which they come in contact a distance of several feet.

Harris, a car repairer of defendants, was at the

time of the accident at the south end of a car recently repaired, and engaged in inspecting it. That car stood on a track running near the freight depot, and close to the platform of that depot, which track was used by defendant for transferring freight from defendant's road to others; there cars would be placed which had to be unloaded into or loaded from the cars of other roads. This track was entirely distinct and apart from the repair track. South of and below the car being inspected on the same track, and distant nearly a car's length was a string of fifteen or twenty cars, and to the north or in the direction of the bridge there stood one car, though not, it seems, on the same track. There was a switch 100 yards north of the car Harris was examining, the track there inclining to the south from the switch. About 175 feet from the freight depot stood a tool house some ten by twelve feet in size, six or seven feet from the track where that, after running south from the switch, bore off to the west before reaching the tool house. There was evidence that this house would, in all probability, obstruct the view of the cars coming down the track, but that a man standing on the freight depot platform could see a car coming down on the track if he looked.

While Harris was engaged in the work of inspection, and either under the south end of the car or else standing on the track at the south end of the car, Hallihan, who was a car repairer of the M. R. etc. R. Co., had been so for several years, and thoroughly conversant with the customs of defendant's yard in respect to defendant's method of distributing cars by means of running switches, being accustomed to being about the yards every day, came along on the freight depot platform, and while there or else near Harris, the latter spoke to him to look how certain repairing had been done on the car being inspected. Hallihan, it seems, complied or attempted to comply with the request made him, when a freight car, switched in the usual way and not coming down very fast, drove the car Harris was examining, a distance of seven or eight feet, ran against Harris and over Hallihan, resulting in the death of the latter. The position that Hallihan occupied at the time of the fatal occurrence, it is impossible to determine. Harris says: "I had no time to look to see what deceased was doing, the accident was so sudden; I should judge that if he had time after I spoke to him, he was stooping down looking at the car when the accident happened." "I don't know whether Hallihan was stooping down on the track looking at the car." "The accident happened so quick after I spoke to him, that I don't know what was done; it was almost the instant I spoke that the accident happened; there was no time for looking after the words were spoken." This witness also states that he looked immediately after the cars came together, and saw no brakeman on the car or near there; that it was not impossible for a brakeman standing on the car coming down, when within four cars' length or 128 feet, to see Harris and Hallihan behind the car, though there was "great improbability of it." There was positive testimony of several other witnesses that there was a brakeman on the car which caused the injury.

The foregoing was the substance of the testimony, and upon that we are called upon to say whether the court below erred in its refusal to give, at the instance of the defendant, an instruction in the nature of a demurrer to the evidence.

We think such an instruction should have been given, and these are our reasons therefor: There is nothing in the evidence adduced at the trial to show that defendant was aware of the perilous position in which Hallihan had placed himself, or that even if thus aware, the injury complained of could have been prevented; for the testimony of Harris conspicuously shows that the negligent act of Hallihan, and the act of defendant causing his death, were to all practical intents and purposes, simultaneous and concurrent acts. Harris calls to Hallihan, the latter responds or attempts to respond to the call, and immediately the car being examined is struck. So quickly does the one event succeed the others, that Harris will not undertake to say what the position of Hallihan was when receiving the injury. If Harris, in the immediate presence of, and in contiguity to, Hallihan, was not able to discover his position, would it not be altogether unreasonable to demand that a brakeman, if on the incoming cars, should be required to do more, and for failing to do this, to demand that the company be held liable? Liability is never created except by the non-performance of duty, but it was not a failure to perform a duty because the defendant failed to anticipate that Hallihan would prove a trespasser on its track.

The defendant company had as much right to a free and unobstructed use of that track and of its yards, and as little cause to suspect or anticipate an interference with those rights, as has the honest farmer for similar unfavorable anticipations when, driving his team afield within his own lawful inclosure, and on the soil of his own homestead. The case is even stronger in behalf of the company in consequence of the peril attendant on, and incident to, coming in contact with the dangerous character of the machinery which the prosecution of its business compels it to employ. A person would perhaps be guilty of but slight negligence while attempting to cross or temporarily to obstruct the roadway of a slow-moving farm wagon, while he would be justly held guilty of the extreme of rashness, should he attempt to cross or to temporarily obstruct the roadway of a moving car. These remarks, applicable in all instances where a railroad company is engaged in distributing cars and making up trains in its own private yards, where it owes no special duty to the general public, as is the case of streets, public crossings and the like, apply with unwonted force in the present instance; for not only was Hallihan not engaged in the exercise of a legal right, but he incurred a special risk by venturing upon the transfer track of defendant, and undertaking to examine a car there, when it must be presumed from the facts in evidence, that he was familiar with the peril his rash act invited. That track

was devoted to the particular purposes which the evidence discloses, and there was no ground for the presumption that the track in question would be used for any other purposes than those mentioned, or that defendant's servants thus engaged in switching the cars would anticipate the unaccustomed and unwarranted use to which the track was applied. Now, if it be true, as before stated, that liability can only result from a non-performance of duty, and if it be also true that it was not the duty of defendant to anticipate a failure on the part of Hallihan to observe the most obvious and ordinary dictates of prudence, then, of necessity, it follows, that defendant, failing in the performance of no duty, has incurred no liability.

If the defendant's servants, with knowledge of Hallihan's dangerous position, or with good grounds to suspect his danger, wilfully or recklessly permitted the car being switched off to strike the one being examined, a very different question would be presented. But there is no element of wilfulness in this case, and, therefore, in this respect, it is not distinguishable in principle from cases heretofore decided by us, where we held, as a matter of law, that no cause of action existed. Maher v. Atlantic, etc. R. Co., 64 Mo. 267; Harlan v. St. Louis, etc. R. Co., 64 Mo. 480, 6 Cent. L. J. 229.

For the foregoing reasons the judgment will be reversed.

All concur.

RECEIVER—ACTION AGAINST—NO RIGHT TO JURY TRIAL.

KENNEDY v. INDIANAPOLIS, ETC. R. CO.

United States Circuit Court, Southern District of Ohio, July, 1880.

1. No suit can be prosecuted against a receiver without the consent of the court appointing him, and the latter may take all such controversies to itself and refuse to allow a suit in another forum.

2. A State statute permitting suit to be brought against a receiver in courts other than the one of his appointment, can not control the action of a Federal court.

3. A petition claiming damages for personal injury by a defendant corporation in the hands of a receiver, is not a "suit at common law," within the meaning of the Constitution, and the petitioner is not entitled to a jury trial as of right.

BAXTER, J.

The defendant, a railroad corporation, issued a large number of bonds, and executed a mortgage on its road, franchise and property to secure their payment; and having failed to pay the interest as it accrued, a bill was filed in this court to foreclose the security. On complainant's application a receiver was appointed to preserve and operate the property *pendente lite*. One of his trains ran over and killed a Mrs. Cook, whose husband, after administering on her estate, sued therefor in a State court. But at the instance of the receiver he was ordered to dismiss his suit, with leave to be heard in this case. He thereupon filed his petition here, set forth his cause of action, and demanded a trial thereof by a jury.

These questions have been definitely settled by repeated adjudications. A receiver represents the court. There can be no interference with money or property in possession of a receiver without the permission of the court appointing him. Jones on Railroad Securities, 502-3; Story's Eq., 831. The power to appoint receivers is of great utility. Ship v. Harwood, Atk. 564. A receiver is an officer of the court appointing him, and is entitled to its protection. He can do nothing except as he is authorized by the court. And when in possession of money or property, under the orders of the court, it is a contempt of the court to disturb his possession. No suit can be prosecuted against a receiver in any other forum without leave of the court under whose order he is acting, as the latter will not allow itself to be made a suitor in any other tribunal. Story's Eq., 833. Such a practice would lead to inextricable confusion, and subject the fund in the custody of one court to the judgments and decrees of other and different courts. But an injured party is not without a remedy. He may apply to the court having the custody of the property or fund for appropriate relief. And upon such application he will be permitted to go before a Master, or sue in a court of law. Story's Eq., pp. 831-833.

A court appointing a receiver, although not compelled to assume jurisdiction of all controversies to which the receiver may become a party, but being at liberty to leave their determination to any court of appropriate jurisdiction, may nevertheless assert its right to take all such controversies to itself. Its power is unlimited for purposes of protection, and it may restrain the prosecution of suits against the receiver in other courts, and punish, as for contempt, any interference with its officers by force or by suit. Jones on Railroad Securities, p. 503. The court will not permit any person to interfere either with money or property in the hands of its receiver, without leave, whether it is done by consent or submission of the receiver, or by compulsory process against him. All moneys coming into the hands of a receiver by the order of the court, are moneys belonging to the court, and the receiver is bound to distribute in obedience to the orders and directions of the court. Kerr on Receivers, 168. The receiver's possession being the possession of the court from which he derives his appointment, he is not subject to the process of garnishment as to the funds in his hands, or subject to his control, and such process will be regarded as a nullity. The court being in the actual custody of the property or fund will not yield its jurisdiction to another court, and permit the right of property to be there tried. It will not permit itself to become a suitor in another forum concerning the property in question. If a receiver's liability to be sued in another court was recognized, it would defeat the very ends for which he was appointed—since a judgment in another court upon the garnishment would, if recognized and sustained, divest the jurisdiction

having custody of the fund. High on Receivers, 151. In Wiswall v. Simpson, 14 How. 65, the Supreme Court of the United States say: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment (or other appropriate action), or permit him to be examined *pro interesse suo*. Now, the doctrine that a receiver is not to be disturbed extends to cases in which he has been appointed, without prejudice to the rights of persons having prior legal or equitable interests. The individuals having such prior interests must, if they desire to avail themselves of them, apply for leave to sue or to be examined *pro interesse suo*, and this, though their right to the possession, is clear." And in the case of Davis v. Gray, 16 Wall. 218, Mr. Justice Swayne says: "A receiver is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not allow him to be tried touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law by reference to a master, or otherwise, as the court in its discretion may see fit to direct."

Such has been the uniform holding of the courts until recently, since which modifications of the rule have been attempted by a few exceptional adjudications and by legislative enactments in some of the States. A statute of this kind exists in Ohio. But this statute can not control the action of this court. Jones on Railroad Securities, p. 503; Hale v. Duncan, 7 Cent. L. J. 146, and Thompson v. Scott, 4 Dillon, 508, 3 Cent. L. J. 737. Nor can we yield to the modification of the rule adopted by some of the State courts. These decisions have been ably reviewed by Love, J., in the case of Thompson v. Scott, and his refutation of them maintained by a cogency of reasoning that ought, we think, to forever foreclose all further discussion of the question. Mr. High, who advocates (in an article published in the *Southern Law Review*) the new doctrine, admits that, "the weight of authority is adverse to the exercise of any right of action against a receiver, by any court other than that from which he derives his appointment and to which he is amenable."

No other theory than that insisted on by us could be practically maintained, as the facts of this case will sufficiently demonstrate. The defendant is the owner of an important line of railroad. Upon application duly made, this court, in the exercise of its unquestioned jurisdiction, seized the property and put it into the hands of a receiver, to be held, preserved and operated for the benefit of the parties entitled, until the rights of the parties could be judicially ascertained and declared, and a sale of the property effected. We must presume that everybody dealing with the receiver knew the character in which he was acting; that he was the representative of the court, and acting under its orders, and that if any damages were inflicted by reason of any breach of contract, or wrongful or negligent act of the receiver, or of his employees, this court was competent to award pecuniary reparation. It has the custody of the fund from which compensation is to be made; and why may the court not determine the matter by a proper issue at law, "by reference to a master, or otherwise, as the court in its discretion may see fit to direct?" This practice, besides having the sanction of the Supreme Court of the United States, affords a cheap, simple, expeditious and effective remedy. This court having the custody of the fund out of which the petitioner's demand, in case he succeeds, is to be satisfied, can order and enforce payment therefrom of any sum that may be found due him. Whereas, if the petitioner is permitted to prosecute his suit in the State court to judgment, and recovers, that court could not, by any process recognized by law, compel satisfaction. But the petitioner would, in order to obtain satisfaction, have to bring his judgment into this court and ask for its payment, when it would become the duty of this court to look into the merits of his claim and satisfy itself of its validity before making an order to pay it. This it can do as well before as after judgment in another court. The judgment in another court recovered in a suit prosecuted without leave, against a receiver, would, as we have seen, be a nullity. It could not be enforced against the receiver personally, nor reach and subject the funds in the custody of this court in any other way than through an order made here. Being a nullity and without legal force, why sue for and recover it? The doctrine contended for by the petitioner "contravenes," says Judge Love, "the whole scheme of equity jurisdiction in the matter of appointing receivers, and in the taking of possession through them of the property in litigation." The property in the hands of a receiver is "a fund subject to the disposition of the court and under its exclusive control. The principle that the court which has actual possession of the fund, has the exclusive right to determine all claims and liens asserted against it, is fundamental. Hence every court of equity in such a case assumes to decide all controversies touching the subject matter of the suit and the fund; to determine the existence and priority of all liens; to adjust and settle all disputed claims, marshal the assets, and finally to distribute the surplus among those who are entitled to it." "The ground and reason of this jurisdiction is the inadequacy of legal remedies." But if petitioner's theory of the law is maintained,

"if a party can without leave assert his right against a receiver in another court, and in this way withdraw controversies in regard to the trust fund from the court having the custody of it, the fund would be disposed of, not by the court having it in charge, but by another or other tribunals." And "before the court appointing the receiver could make a final disposition of the rights of the parties before it," says Judge Love, "other courts might render judgment against the receiver to an amount sufficient to absorb the whole fund or property, and the litigation would prove barren of results to the parties in the cause." If a party has the right, without leave, to sue a receiver in another court than that of his appointment, it follows that he can select his tribunal. He could, therefore, in proper cases, sue as well before a justice of the peace as in a court of record, and thus subordinate the court of equity to the judgments of justices of the peace. Different parties might sue in as many different courts. These different tribunals, in possession only of parts of the case, and called on to act in the absence of the parties to the original suit, would have to give judgments in ignorance of the equities of the whole case. Their judgments, under such circumstances, might and probably would be inconsistent and conflicting. One court might order one thing, and another court another contrary and different thing. An attempt to enforce these conflicting judgments would result in a conflict of judicial authority. The pendency of outside litigation, seeking to subject the trust fund in the hands of the receiver, would necessarily occasion delay. No final disposition of the original cause could be safely made until the litigation pending in other courts against the receiver was determined. The average life of a contested law suit in the courts of Ohio, I understand, is about five years. Before one suit could be determined another would most likely be instituted, and thus the court which first obtained jurisdiction would be ousted of its control of the trust fund, and rendered impotent to adjust the equities of the case, close the receiver's account, and terminate the litigation. We can not sanction a doctrine fraught with so many inconveniences and complications.

It follows from what we have already said that the second position is as untenable as the first. The petitioner claims that a trial by jury is guaranteed to him by the Constitution. This instrument provides that "in all suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." The amount in controversy in this case is more than $20, and if the petitioner's case is "a suit at law," his demand for a trial by jury must be conceded. But it is not a suit at law. The original cause in which he intervenes is of equitable cognizance and could not have been maintained in a court of law. It is then a chancery cause pending in, and to be determined by a chancery court. The constitutional guarantee securing trial by jury does not in terms extend to chancery courts. It has not been so understood or interpreted. On the contrary, courts of chancery are, and always have been, invested with the prerogative of deciding the facts as well as the law of cases pending before them. Their right, generally, to do this, has not been denied by the counsel in this case. But it is said, *arguendo*, that this case is an exception to the general rule, because the wrong complained of is a tort, for which, apart from the other considerations to be hereafter adverted to, an action at law is the only remedy; and if the case was prosecuted in a law court the right to trial by jury would exist. Certainly an action at law could have been maintained for the alleged wrong if there was any one capable of being sued. But the receiver is not personally liable, and this court can not be sued without its consent, and this consent it declines to give. There is, therefore, no one suable at law, and there is, consequently, no such suit. The petitioner is compelled to seek redress here or forego all relief. And coming here he will be required to pursue his remedy according to the practice prevailing in this court. Under this practice, as herein previously stated, the court may decide the facts as well as the law, and the right to do this extends to all questions coming legitimately before it. This right is not confined to questions arising upon the original pleading nor to questions of equitable cognizance. When the jurisdiction has once attached the court will grant full relief, although the questions presented are not ordinarily within the scope of chancery jurisdiction. Bispham's Principles of Eq., p. 565. And where chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters, of which it has only incidental cognizance, in order to avoid a multiplicity of suits. Doggett v. Hart, 5 Fla. 215; Haggin v. Peck, 10 B. Mon. 210.

The principle is a familiar one. Cases exemplifying the propriety and the necessity of the rule are of frequent occurrence. An action of ejectment, unmixed with any equitable considerations, is an action at law; and if brought in a court of law, the parties, under the Constitution, have the right of trial by jury. But if there is some element of equity in the case—such as a cloud on the title—the party owning the superior title may file a bill in chancery to remove the cloud, and the court, having thus acquired jurisdiction, is authorized to inquire, by its own methods, into and pass upon the title, a question purely legal, remove the cloud, and proceed and administer full relief by ejecting the party wrongfully in possession, and putting the adverse party therein. So the remedy to collect a promissory note is at law, and if thus sued the parties would be entitled to a trial by jury. But if it is secured either by pledge or mortgage, and a bill is filed to subject the security, a Court of Chancery would have jurisdiction. And being thus invested with equitable jurisdiction, it could decide any issue, legal or equitable, made in the case, ascertain the sum due and enforce its finding by an appropriate decree. The same principle is applicable to a creditor's bill filed to marshal assets and distribute the estate of a decedent or insolvent corporation. The

debts may be evidenced by obligations on which suits at law only could be maintained. But a Court of Chancery obtaining jurisdiction to marshal assets, is authorized to ascertain how many debts are due, to whom owing and the amount of each, as incident to its equity jurisdiction to marshal the assets, etc. These examples are *apropos* to illustrate the case in hand. The bill to foreclose the mortgage in this case gave the court jurisdiction over the whole subject matter of the litigation, and conferred upon it authority to hear and determine all collateral issues that might be involved in the controversy. The court had power to appoint a receiver and to order him to operate the road; to employ operatives and fix their wages, contract for the carrying of freight and passengers; to order payments for injury done to freight; compensate shippers for damages sustained on account of non-delivery of goods, and make reparation to persons for injuries inflicted by the negligent or wrongful action of its servants, and the court could, in its discretion, in order to a just discharge of its duties, call in a jury, invoke the assistance of a master, or take such other steps for a judicial ascertainment of the facts as it might regard most appropriate in the particular case. Its right to proceed in this way has been recognized and followed for an indefinite period. It may, but is not compelled, to call a jury. Whether it will or will not send the issues to a jury is a matter resting in the judicial discretion of the court. A court could not well operate a railroad through a receiver in any other way. The remedy is cheap, speedy, effective and just. It may, however, be abused—so may any other judicial power—but the protection against abuse, in cases of this kind, is not to be found in an appeal to a jury, but in an appeal to the court of last resort. This remedy is open to the petitioner. If injustice shall be done him here, the error will be corrected by the Supreme Court.

The intervention of a jury is not deemed necessary in this case, and the petitioner's motion for one will be denied.

NOTE.—1. *The Constitutional Right of Trial by Jury.* "Though the right of trial by jury is preserved by the Constitution of the United States, the States may, nevertheless, if they choose, provide for the trial of all offenses against the States, as well as the trial of civil cases in the State courts, without the intervention of a jury." Cooley on Const. Lim. 19 n. Speaking of the Fifth Amendment to the Constitution, Chief Justice Marshall says (Barron v. Baltimore, 7 Pet. 250): "These amendments" (referring among others to the Seventh Amendment) "contain no expression indicating an intention to apply them to the State governments." "The Seventh Amendment does not apply to trials in State courts." Edwards v. Elliott, 21 Wall. 557. See Twitchell v. Commonwealth, 7 Pet. 247; Livingston v. Moore, 7 Pet. 551; Fox v. Ohio, 5 How. 434; Smith v. Maryland, 18 Id. 76; Foster v. Jackson, 57 Ga. 206; Joseph v. Bidwell, 28 La. Ann. 383; Sauvinet v. Walker, 27 La. Ann. 14; s. c. 92 U. S. 92, 3 Cent. L. J. 445. In the last case the court say, after stating that the Seventh Amendment relates only to trials in the courts of the United States: "A trial by jury in suits, at common law, pending in the State courts, is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." Similar, although not identical provisions exist, however, in the Constitutions of the various States.

2. *When the Right to Trial by Jury Exists.* The right to trial by jury exists under the Constitution in criminal cases, and under the Seventh Amendment, in "all suits which are neither of equity nor admiralty jurisdiction, whatever may be their peculiar form." Parsons v. Bedford, 3 Pet. 433. It may be waived in civil cases and misdemeanors. Cox v. Moss, 53 Mo. 432; State v. Borowsky, 11 Nev. 119; Com. v. Dailey, 12 Cush. 80. But not in felonies. Work v. State, 2 Ohio (N. S.), 296; Cancerni v. People, 18 N.Y. 128; Brown v. State, 8 Blackf, 561; State v. Mansfield, 41 Mo. 470. Nor on trial for larceny. Allen v. State, 54 Ind. 461. The rule that trial by jury can not be waived "is universal as to felonies, not quite so as to misdemeanors." State v. Lockwood. 43 Wis. 405. The jury must consist of twelve men. Vaughn v. Seade, 30 Mo. 600; State v. Van Matre, 49 Mo. 268. And in criminal cases be from the vicinage. Wheeler v. State, 24 Wis. 52; Kirk v. State, 1 Cold. 344: Osborn v. State, 24 Ark. 629; Swart v. Kimball, 11 Cent. L. J. 71; Cooley Const. Lim. 319, 410 n. But it was held in State v. Potter, 16 Kas. 80, upon a trial for murder in the second degree, that the right to be tried by a jury of the county or district "is a mere personal privilege, bestowed upon the accused, which he can waive or insist upon at his option." Jury trial may be claimed in probate court in Indiana. Clem v. Durham, 14 Ind. 263. May be claimed in contest of wills. Tingley v. Cowgill, 48 Mo. 291. "Where an issue in *quo warranto* is sent down to the circuit court to be tried, the parties can not be denied a jury." People v. Doesburg, 16 Mich. 133. The right to jury trial exists in contests for office. State v. Head, 22 La. Ann. 54. "In prosecution of information to enforce a seizure under the act of Congress of August 6, 1861, issues of fact should be submitted for trial by a jury." U. S. v. Armory. 2 Abb. (U. S.) 129. Questions of fraud in Louisiana can not be tried without a jury, where either party insists upon right to a jury. Bank of Louisiana v. Delery, 2 La. Ann. 648. And so in New York. "An issue of fraud ought to be tried by a jury." Freeman v. Atlantic Mut. Ins. Co., 13 Abb. Pr. 124; Levy v. Brooklyn Fire Ins. Co., 25 Wend. 687. "An action to recover damages for a tortious conversion of property can be tried in no other way than by a jury, unless the parties waive that mode of trial." Lewis v. Varnum, 12 Abb. Pr. (N. Y.) 305. The right to a jury exists in an "action to abate a nuisance, and recover the damages occasioned thereby, although the complaint is in form as for equitable relief, and the prayer for damages may be regarded as incidental thereto." Hudson v. Caryl, 44 N. Y. 553, and cases cited. "In action on a note for foreclosure of a mortgage securing it, and determination of the priority of liens, the defendant is entitled, on demand, to have the issues tried by a jury." Clemenson v. Chandler, 4 Kas. 558. Under the code of New York, a complaint may include both legal and equitable claims, the legal causes may be tried by a jury and the equitable by the court. "In actions seeking equitable relief, a party is not entitled as a matter of right to have the issues tried by a jury." McCarty v. Edwards, 24 How. (N. Y.) Pr. 236. But "where, in an action between partners to settle copartnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction, perhaps questions of veracity, of mistake or fraud in the drawing of papers, etc., and is manifestly an inquiry which business men accustomed to examine facts should decide, the court will

direct the issues to be tried by a jury.'' Clarke v. Brooks, 26 How. (N. Y.) Pr. 285. And ''although an action for partition is an equitable action, yet under N. Y. Code, sec. 448, where issues of fact are presented by the pleadings, a jury trial is a matter of right.'' Hewlett v. Wood, 62 N. Y. 75. ''Compulsory reference of issues of fact to the determination of a single person is a violation of the constitutional right of trial by jury.'' Bernheim v. Waring, 79 N. C. 56.

3. *Certain Limitations of the Right.* A law providing that the party demanding a jury shall pay the jury fees, etc., is not unconstitutional. Randall v. Kehlor, 60 Me. 37; Adams v. Corriston, 7 Minn. 456. But *contra:* ''A defendant is entitled to a jury trial without paying the fees in advance.'' ''And the refusal of a defendant demanding a jury to pay such fees in advance, confers no jurisdiction upon the court to try a question of fact.'' Hine v. Sweney, 3 G.Gr. Iowa, 511. ''Agreeing on a reference is a waiver of a right to a jury trial, one party can not afterwards demand it.'' State v. Brown, 73 N.C. 81. A statute providing for sending certain cases, requiring an examination of vouchers or an investigation of accounts, to an auditor, and making the auditor's report evidence to the jury, is not in violation of the Constitution. Perkins v. Scott, 57 N. H. 55, and cases cited; Doyle v. Doyle, 56 N. H. 567. But a law ''which provides that upon the trial by jury of a cause which has been referred under the act, 'the report of the referee shall be evidence of all the facts stated therein, subject to be impeached,' is unconstitutional and void.'' King v. Hopkins, 57 N. H. 334; Plimpton v. Somerset, 33 Vt. 283; Francis v. Baker, 11 R. I. 103.

4. *When Jury Trial not of Right.* A trial by jury is not of right in proceedings by commissioners to condemn land. Louisiana & Frankfort Plank Road Co. v. Pickett, 25 Mo. 535. Nor in motions and the like. Hart v. Robinett, 5 Mo. 11; Hensley v. Baker, 10 Mo. 157. Nor in distress warrant issued by the solicitor of the treasury. Murray's Lessee v. Hoboken Land and Improvements Co., 18 How. 276. Nor in ''suits against the government. They are not suits at common law.'' McElrath v. United States, 12 Ct. of Cl. 312. Nor in divorce suits. Mead v. Mead, 1 Mo. App. 247; Coffin v. Coffin, 55 Me. 361; Anonymous, 5 How. Pr. 306. Nor in issues of *nul tiel record.* Hooker v. State, 7 Blackf. 272; Thompson v. Williams, 15 Miss. 270. Nor in ''proceedings to close the business of a corporation on the ground of insolvency,'' Case of Mechanics Fire Ins. Co., 5 Abb. (N. Y.) Pr. 444. Nor in proceedings taken by corporations for the removal of a member for offenses against the corporation. People v. N. Y. Com. Assn, 18 Abb. (N. Y.) Pr. 271. Nor in actions brought under a statute to determine the title to land of which the plaintiff has possession. Ellithorpe v. Buck, 17 Ohio St. 72. ''The action of a police magistrate in committing a minor child to an industrial school for his training and reformation, does not amount to a criminal prosecution, nor to proceedings according to the course of common law. And the minor is not entitled to a trial by jury.'' *Ex parte* Ah Peen, 51 Cal. 280.

''The provisions of the Constitution that 'the right of trial by jury shall be secured to all, and remain inviolate forever,' refers to the right as it existed at the time of the adoption of the Constitution.'' State v. McClear, 11 Nev. 39; State v. Raymond, 11 Nev. 98; People v. Lane, 6 Abb. (N. Y.) Pr. N. S. 105; Whitehurst v. Coleen, 53 Ill. 247. But ''increasing amount required to entitle a defeated party, in an action before a justice, to appeal, and obtain a jury trial,'' is not prohibited. Guile v. Brown, 38 Conn. 237.

In equity cases ''an issue to try a matter of fact will be ordered or not according to the sound judicial discretion of the court.'' Ward v. Hill, 4 Gray 595; Colman v. Dixon, 50 N. Y. 572; Lake v. Tolles, 8 Nev. 285; Hatch v. Peugnet, 64 Barb. (N. Y.) 189; Weil v. Kume, 49 Mo. 158; Palmer v. Lawrence, 5 N. Y. 389; Cahoon v. Levy, 5 Cal. 294; Parsons v. Bradford, 3 Pet. 433; Ellis v. Kreutzinger, 31 Mo. 432; Bray v. Thatcher, 28 Mo. 132; Gray v. Hornbeck, 31 Mo. 400; Hunter v. Whitehead, 42 Mo. 524; Koppikus v. Commissioners, 16 Cal. 248; Heyneman v. Blake, 19 Cal. 579; Smith v. Moberly, 14 B. Mon. (Ky.) 70. ''It is not indispensably necessary, as a matter of law, in any case that any question in an equity suit in a Federal Court should be sent to a jury.'' Goodyear v. Providence Rubber Co., 2 Cliff. 351. In the same case it is said: ''Trial by issue indeed, forms no necessary appendage to a court of equity even in the parent country, and never did, except that, perhaps, an heir at law, where the object of the suit was to divest him of a freehold estate of which his ancestor died seized, or the rector of a parish, where his common law right to tithes was drawn in question, might be entitled to issues as matter of right.'' ''Excepting these cases, it is clear that the motion for issues was always regarded as one addressed to the sound discretion of the chancellor.'' As to issues out of chancery, see 2 Dan. Ch. Prac. 1085.

In the principal case a trial by jury is denied where the claim for damages arose ont of a tort. The whole law as to receivers of railroads, operating them under the supervision of the court, is of late date. There may, therefore, reasonably be a doubt as to the ultimate decision of the question in this case. Certainly it does seem a hardship that by the appointment of a receiver, the road in its liability for its wrongful acts, should become a privileged person, and that not only the fact of injury, but the quantum of damages, thenceforth, should be inquired into by one man, whilst the citizen is deprived of a most cherished right.

ABSTRACTS OF RECENT DECISIONS.

NOTES OF RECENT DECISIONS.

TRADE-MARK—OWNER OF, NEED NOT BE MANUFACTURER OF ARTICLE TO WHICH ATTACHED.—It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached. It may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in the putting the commodity to which it is applied upon the market. Plaintiff, who claimed as a trade-mark a label which he placed upon an article which he named ''Julienne,'' was not the manufacturer of the article, but it was manufactured and put up in Paris expressly for him. He devised the ingredients and became the importer of the prepared article. He was interested in the result of sales of the article which were made in the names of third persons and not his own. Defendant thereafter offered for sale substantially the same kind of goods, and placed upon the package a labe which was a copy of plaintiff's, except that in place of plaintiff's monagram ''A G'' a monogram ''F G'' was substituted. *Held*, that the plaintiff was entitled to protection against defendant in the use of his trade-mark. Hostetter v. Worinkle, 1 Dill. 329. The plaintiff acquired the right to the exclusive enjoyment of the trade-mark not alone by devising it,

but "by its prior use and application in the manner in which it has been imitated and employed by the defendant." Walton v. Crowley, 3 Blatchf. 440; and this is so although the goods were manufactured for him and not by himself, for he had the same legal right to affix and maintain a special trade-mark in one case as in the other. Amoskeag Mfg. Co. v. Spear, 2 Sandf. 614; Taylor v. Carpenter, Sand. Ch. 614. To the same effect is Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291. New York Court of Appeals. Opinion by DANFORTH, J.—*Godillot v. Hazard.*

ATTORNEY AND CLIENT—ATTORNEY NOT LIABLE TO STENOGRAPHER FOR SERVICES IN SUIT—AGENCY.—The rule is well established that where a person contracts as the agent of another and the fact of his agency is known to the person with whom he contracts, the principal alone and not the agent is responsible. This rule applies to the relationship of attorney and client, and except as to a certain class of officers who are not within the rule, attorneys can not be held personally responsible for the services of a stenographer rendered in a suit, unless there is a special obligation to that effect. Judson v. Gray, 11 N. Y. 408; Covel v. Hart, 14 Hun, 252; Bonynge v. Waterbury, 12 Id. 534; Sheridan v. Genet, Id. 660. And in an action by a stenographer against a firm of attorneys for services in an action, evidence of previous dealings of plaintiff with the firm where he performed work in other actions, furnished bills to the firm and received pay from them, *held*, inadmissible. What had been done on other occasions would not show what the contract was in reference to this transaction, and render defendants liable for plaintiff's claim in this case. New York Court of Appeals. Opinion by MILLER, J.—*Bonynge v. Field.*

CONTRACT—CONSTRUCTION OF—ADVERTISEMENT IN BOOK SOLD BY SUBSCRIPTION.—An agreement between the parties provided for the publishing in a book to be called "The Great Industries of the United States," an advertisement of defendant's business at a compensation measured by the number of books sold. It recited that the plaintiffs were about to publish such a book which would be sold by subscription through their authorized agents "in every State in the Union and in Canada;" that in the work was to be inserted the advertisement mentioned, in consideration of which the defendant agreed to pay "the sum of two cents for six pages of the said article for each and every copy of said work sold by said" plaintiffs, and plaintiffs agreed to furnish a verified certificate "as to the number of copies of said work actually sold and delivered to subscribers." In an action upon this contract it was shown that plaintiff had agents in every State and in Canada, who canvassed for subscribers to books published by plaintiffs and then ordered the number of books required for delivery to subscribers, and paid for them, and the books were shipped by freight or express, directed to the agents who delivered them to subscribers, the plaintiffs having no personal connection with the delivery and no knowledge of the individual subscribers except through these agents. *Held*, that evidence that plaintiff had actually delivered to their agents, and had been paid for a specified number of the books named, was sufficient proof *prima facie* that they had sold the specified number in the way agreed, without evidence of a delivery to each individual subscriber. *Held*, also, that the contract did not call for a sale of the books in every State as a condition of defendant's liability. If the compensation had been fixed at a gross sum, it might have been claimed that the consideration implied a sale in all the specified places, but otherwise, the compensation being limited to a specified sum for each book sold. See as sustaining the holding that evidence of delivery to agents was sufficient to establish a liability on the part of defendant, Burr v. Crompton, 116 Mass. 493. In that case it was held that the evidence was sufficient to justify a verdict for plaintiffs. Here it was held sufficient on this point, there being no conflicting evidence to set aside a decision of the referee for defendants. New York Court of Appeals. Opinion by CHURCH, C. J.—*Burr v. American Spiral Spring Co.*

CORPORATION—MAY BE INDICTED FOR SABBATH BREAKING.—A corporation may be indicted for "Sabbath breaking" under the Code of West Virginia, which provides that, "If a person on a Sabbath day be found laboring at any trade or calling, or employ his minor children, apprentices, or servants in labor, or other business, except in household or other work of necessity or charity, he shall be fined not less than five dollars for each offense." The modern authorities agree that corporations are liable for torts committed by their agents in the discharge of the business of their employment and within the proper range of such employment; and that, too, whether the tort be one the responsibility for which is to be enforced by an action on the case, or by trespass. See Yarborough v. Bank of England, 16 East, 6; Rex v. Mayor of Stratford, 14 Id. 348; Regina v. Birmingham etc. Co., 3 Ad. & E. (N. S.) 223; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452; Chestnut Hill Turnp. Co. v. Rutler, 4 Serg. & R. 16; Whiteman v. Wilmington etc. R. Co., 2 Harr. (Del.) 514; Bloodgood v. Mohawk etc. R. Co., 14 Wend. 51, Hay v. Cohoes Co., 3 Barb. 43; Underwood v. Newport Lyceum, 5 B. Monr. 130; Humes v. Mayor of Knoxville, 1 Humph. 403; Hazen v. Boston, etc. R. Co., 2 Gray, 574; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580; Baylor v. Balt., etc. R. Co., 9 W. Va. 270. See, also, Southeastern R. Co. v. European, etc. Tel. Co., 24 Eng. L. & Eq. 513; Queen v. Great North Railway, L. R. 2 Q. B. 151: Maund v. Monmouthshire Canal Co., 4 Man. & G. 452. They are liable for the acts of their agents, though willfully or maliciously done. For libel; where the agent of a railway company telegraphed along its line that a banker had stopped payments. Whitfield v. Southeast R. Co., referred to in 21 How. 212, where a report was made to stockholders by directors. Philadelphia, etc. R. Co. v. Quigley, 21 How. 202. See, also, Maynard v. Firemen's Fund Ins. Co., 34 Cal. 48. In National Exch. Co. of Glasgow v. Drew, 2 Macq. H. L. Cas. 103, a corporation was held liable for a fraudulent misrepresentation of its affairs in a report, whereby a party was induced to purchase its stock. And in Goodspeed v. East Haddam Bank, 22 Conn. 630, it was held that an action for a malicious prosecution could be sustained against a corporation. In Atlantic & Great Western R. Co. v. Dunn, 13 Ohio St. 162, and in Pittsburg, etc. R. Co. v. Shiper, Id. 157, it was decided that a corporation might be subjected to exemplary or punitive damages for tortious acts of its agents or servants done within the scope of their authority; and in Moore v. Fitchburg R. Co., 4 Gray, 465, that a corporation might be sued for an act of its servants while acting within his authority, which amounted to an assault and battery. It may now be regarded as settled, not only that a corporation may be sued in tort, but that it may be indicted for a failure to perform certain public duties which the law or its charter imposed upon it. See Freeholders v. Strader, 3 Harr. 108; Regina v. Birmingham & Glo. R. Co., 9 Carr. & P. 469: Susquehanna & Balt. Turnp. Co. v. People, 15 Wend. 267; Commonwealth v. Proprietors of Newburyport Bridge, 9 Pick. (Mass.) 142; Regina v. Great North. Ry. Co., 3 Ad. & El. (N. S.) 319; State v. Vt. Cent. R. Co., 27 Vt. 108; Commonwealth v. Proprietors N. B. Bridge, 2 Gray, 339.

West Virginia Supreme Court of Appeals. Opinion by GREEN, P. J.—*State v. Baltimore, etc. R. Co.*

SUPREME COURT OF IOWA.

June, 1880.

RAILROADS — INJURY TO EMPLOYEE — DUTY TO PROVIDE SAFE CARS — FELLOW-SERVANTS.—1. The plaintiff, a car brakeman, was injured while descending from a car by the ladder, the "hand hold" on said car being out of repair. The car was received by the defendant at Beverly, Missouri, on the twelfth day of October, 1876, from a connecting road, and was taken to Chicago, and it was on its return trip, on the seventeenth day of October, when the accident occurred. There was evidence tending to show that the car was in good order when received by the defendant. It reached Beverly on the day after the accident, and was again inspected, and the "hand hold" found in bad condition. The inspector testified he put on a new one, and that the wood was sound, and indicated the "hand hold" had been out of repair only a short time not exceeding a week. The evidence, therefore, warranted the conclusion the "hand hold" had got out of repair at some time on the trip to and from Chicago. *Held*, that it was error to instruct the jury to find for the defendant. Railroads are bound to use ordinary care in the selection of machinery and appliances, so as not to subject the employee to unreasonable danger that must follow from insufficient tools and appliances, or which are out of repair and therefore insufficient for the purpose intended. It may be assumed that a car, when first placed upon the track, is in proper condition and in every respect suitable for its intended use. But it is a well known fact that in time it will become out of repair and unfit for use. It is not the duty of the employee, who is required to simply use said car when it composes part of a train, to ascertain and know at his peril when such time occurs. Such, however, is the duty of the corporation, and ordinary care must be used to ascertain whether the car is fit to be used; and what is such care must be measured by the character of the business and the risks attending its prosecution. The duty of inspection is a positive and affirmative duty, to be continuously performed by the defendant. Can the court, therefore, as a matter of law, say when, where and how often such inspection shall take place, or that it should not have been done at some time while the car was under the defendant's control? We think not, and that it was a question for the jury. 2. A car inspector and a brakeman upon a freight train are not co-servants, so that the common master will be relieved from liability for the negligence of such inspector causing injury to the brakeman. Reversed. Opinion by SEEVERS, J.—*Braun v. Chicago, etc. R. Co.*

AGENCY — INTEREST IN SUIT —EVIDENCE—DECLARATIONS.—1. A person dealing with an agent in regard to personal property intrusted to him by the principal, without knowledge that the property is not owned by the agent, but supposing him to be the owner thereof and the principal in the transaction, will possess all the rights that he would have acquired had the transaction been with the real principal. 2. On the trial a witness was permitted to testify against the defendant's objection that one of the defendant's witnesses had said he would be a loser if this suit should be decided against defendant; that the holder of the note would have recourse upon him. *Held*, error. Under the rules of evidence prevailing at common law, the interest of a witness renders him incompetent, and may be shown to exclude his evidence. Under our statute a witness is not incompetent by reason of interest, but it may be shown for the purpose of lessening the credibility of his testimony. Code, §§ 3636, 3637. The rules relating to the admissibility of evidence showing the interest of a witness are the same at common law and under the statute. A difference arises only as to the effect of the interest, and consequently as to the time when it may be shown. At common law the court passes upon the evidence, and if the interest be established excludes the testimony; under the statute the evidence goes to the jury, and is considered upon the question of the credibility of the witness. The difference above referred to does not extend to the manner of showing the interest of the witness. Decisions of the courts made at common law must, therefore, determine the question under consideration. It has been often held that testimony for the purpose of establishing declarations of a witness, to the effect that he is interested in the event of the suit, is not admissible; it is regarded as merely hearsay evidence. Reversed.—*Erickson v. Bell.*

EXEMPTIONS—"HEAD OF A FAMILY."—An unmarried woman living upon premises owned by her, and having with her and providing for two children of a deceased sister, is a "head of a family," within the exemption law. In Parsons v. Livingston, 11 Iowa, 104, the plaintiff was a widower and without children. He purchased the property claimed as a homestead, and took up his residence thereon, taking with him his mother, who was a widow without children, excepting the plaintiff. They continued to live in said house as their home, the plaintiff supporting his mother. It was held that the plaintiff, while thus living, was the head of a family, within the meaning of the homestead act then in force. A family "is a collective body of persons who live in one house and under one head or manager." The case at bar is not different in principle from that above cited. There is no material difference between the statute there construed and the one now in force. It was there held that it was not necessary, to constitute the head of a family, within the meaning of the statute, that there should be children of such head of a family, nor that there should be husband or wife, or that the person claiming to be the head of a family should be a surviving husband or wife to one who was the owner of the property. The court adopted a broader definition and one entirely consistent with the language and spirit of the statute. Affirmed. Opinion by ROTHROCK, J.—*Arnold v. Waltz.*

SUPREME COURT OF PENNSYLVANIA.

April-June, 1880.

CONTRACT — ILLEGAL CONSIDERATION — COMPOUNDING FELONY.—1. In order to avoid a contract on the ground that it was made to compound a felony, the defendant must show preponderating evidence of the actual commission of a crime, and an agreement by the plaintiff to refrain from prosecution. 2. An agreement to refrain from prosecution will not be inferred from a mere threat to prosecute unless a certain thing is done. National Bank v. Kirk, 7 W. N. 256, distinguished. Affirmed. Opinion by STERRETT, J. —*Swope v. Jefferson Fire Ins. Co.*

FIRE INSURANCE — APPLICATION WRITTEN IN LEAD PENCIL.—In an action on a policy of insurance to recover for a loss by fire, the court charged the jury, *inter alia:* "But this paper [the application] is

drawn up in lead pencil, and purports to contain the statements made by Bricker and taken down by the agent at the time the policy was spoken of in the office. It is an application, on its face, not to the City Insurance Company, but to the Fire Association of Philadelphia; that may have been a mistake, perhaps, but we mention that fact to bear us out in saying that the paper was not looked upon as a formal application, but simply taken as a memorandum." *Held*, to have been error; that if the paper was but a memorandum drawn for the convenience of the agent of the company, it was not reasonable that it should have been signed by the assured. There is no good reason why an application for insurance may not be drawn in lead pencil. Reversed. Opinion by GORDON, J.—*City Ins. Co. v. Bricker.*

LIFE INSURANCE—EVIDENCE — WHAT EVIDENCE MATERIAL AS TO HEALTH OF DECEASED BEING IMPAIRED BY DRINKING.—A policy of life insurance contained a clause that the company should not be liable if the insured should become so far intemperate as to seriously or permanently impair his health. In an action brought upon the policy: *Held*, that evidence to show that deceased was an habitual drunkard prior to the date of the policy, and that he had created an appetite which had become fixed upon him, but which had not seriously injured his health at that date, to be followed by the testimony of experts to show that the amount he drank before that date, together with what he drank afterwards, was sufficient to seriously impair a man's health, was inadmissible, as being immaterial and irrelevant. *Held*, *further*, that evidence of the appearance of the deceased after the date of the policy, to be followed by the evidence of an expert that such were the symptoms of hard drinking, was likewise inadmissible. There being no offer to prove that it affected the health of deceased, every thing in the offer was insufficient to constitute a defense. Opinion by MERCUR, J. Affirmed. SHARSWOOD, C. J., and GORDON and TRUNKEY, JJ., dissent.—*Odd Fellows Ins. Co. v. Rohkopp.* 8 W. N. 489.

GUARDIAN AND WARD — WHEN GUARDIAN NOT ALLOWED FOR MAINTENANCE OF WARD.—1. While relationship, either by consanguinity or affinity, except in the case of parent and child, does not of itself rebut the presumption which the law raises that a promise to pay is intended when personal services are rendered, yet it tends to rebut such presumption, and if accompanied by other evidence, is sufficient. 2. Where a ward, being a relation by marriage of her guardian, lived with him during part of her minority as a member of his family, worked therein and was boarded, clothed and schooled as one of his own children, and the guardian frequently declared to his ward and to others that he had adopted her as his own child, never applied to the court for an allowance for the support of the ward, nor made any charge in his books for her support. *Held*, that there was abundant evidence that the guardian had placed himself *in loco parentis* to his ward, and was therefore not entitled to credit in his final account for the maintenance of his ward. Reversed. Opinion by PAXSON, J.—*Horton's Appeal.*

SUPREME COURT OF MISSOURI.

May 17, 1880.

CONSTITUTIONAL LAW—TAXATION OF NATIONAL BANKS — INVALIDITY OF CITY LICENSE.—An ordinance of the City of Carthage required all persons or corporations, doing a banking business within the city, to obtain a city license. Defendant, a National bank, refused to comply with this ordinance, and such proceedings were had, before the city recorder, and in the circuit court, that judgment was rendered against defendant for $100 for such refusal: *Held*, that the only taxation to which National banks can be subjected, is contained in the acts of Congress creating and regulating them, and that the right of defendant to conduct its business in the City of Carthage could be made in no way dependent upon a city license or tax. McCulloch v. Maryland, 4 Wheat. 316; Van Allen v. Assessors, 3 Wall. 573; 4 Wall. 459; 9 Wall. 468; 19 Wall. 490; 23 Wall. 480. Reversed. Opinion by NORTON, J.—*City of Carthage v. First National Bank of Carthage.*

RAILROADS—NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—FAILURE TO RING BELL OR SOUND WHISTLE AT CROSSINGS.—An instruction which declares that, even if plaintiff is guilty of contributory negligence, he may still recover, if defendant might have avoided the injury by the use of ordinary care and caution, is erroneous in not adding the qualification, "after becoming aware of plaintiff's danger." Karle v. K. C. St. Joe & C. B. R. Co., 55 Mo. 476; Isbell v. H. & St. Joe R. R. Co., 60 Mo. 475; Harlan v. St. L. K. C. & N. R. Co., 64 Mo. 480, 65 Mo. 22; Nelson v. At. & Pac. R. R. Co., 68 Mo. 593; Cagney v. H. & St. Joe. R. R. Co., 69 Mo. 416. 2. The neglect of those in charge of a train to ring the bell, or sound the whistle, when approaching a road, or street crossing, as required by statute, raises an implication of negligence. But an instruction on this subject, otherwise correct, which tells the jury that "their verdict should be rendered accordingly," is misleading, as indicating to them that they should find for the plaintiff if defendant had neglected these matters, when their omission does not necessarily render defendant liable. Karle v. Railroad, 55 Mo. 476. An instruction, on the same subject, which requires the bell to be ringing or the whistle blowing at the time of the accident, where it appears that the accident occurred after the engine had passed the crossing, is erroneous as imposing a duty on defendant not required by the statute, which only requires the continuation of these signals until the engine shall have crossed the street or road. R. S. § 806. 3. An instruction to the effect that it was the duty of the plaintiff, when he arrived at the track of defendant's railroad, at the crossing described in the plaintiff's petition, to stop and look and listen, and ascertain whether any train was approaching, before he stepped upon the track, held not applicable to the case of a footman. It is the duty of persons approaching a railroad track to look and listen for an approaching train before venturing upon it; but in those cases where it has been held as a matter of law that such persons should stop and listen, they were traveling in wagons, or other vehicles, the noise of which obstructed their hearing. A footman, without stopping, may as readily see or hear an approaching train by looking and listening, as by coming to a full stop. The failure of the employees to ring the bell or sound the whistle at a crossing, does not absolve a person approaching the track from his duties, or cancel his negligence, and constitute the negligence of defendant the sole proximate cause of the injury. Kennedye v. Railroad, 45 Mo. 255, and Ernst v. Railroad, 35 N. Y. 27, criticised. Fletcher v. Railroad, 64 Mo. 484, and cases; Railroad v. Houston, 95 U. S. 697; Railroad v. Hart, 87 Ill. 529. Reversed. Opinion by HENRY, J.—*Zimmerman v. Hannibal & St. Joe R. R. Co.*

EJECTMENT—WILL — CONTINGENT REMAINDERS. —The right of plaintiff to maintain her action of ejectment in this case depended upon the construction

of this clause in the will of Ceran E. De Lassus: "Second. I will and bequeath unto my dearly beloved wife, Elenore De Lassus, all my property, both real and personal, goods and chattels, moneys and effects, debts due and becoming due, books, papers and accounts of every description, to have and to hold at her will and pleasure during her natural life or widowhood. And at the death or marriage of my said wife, it is my will that all my estate heretofore bequeathed shall be equally divided between my children that are alive, or their bodily children, to-wit: Mary E. Picton, Joseph L. De Lassus, Francis C. De Lassus, Levi E. De Lassus, Camille J. D. De Lassus, Felix M. De Lassus, Eli M. De Lassus, Mary J. De Lassus, Adolph De Lassus, Numa J. De Lassus, and Mary J. De Lassus, in equal share and proportion. And it is my will and pleasure that my said wife has the pleasure, and is permitted, to give to any of my children property towards their portion when they arrive at age, etc." Plaintiff claims through Felix M. De Lassus, and his bodily heir, William A. De Lassus. If the will created a vested remainder in the children of Ceran E. De Lassus, the plaintiff can recover; if the remainder was contingent, she can not recover: *Held*, upon an exhaustive review of the authorities, that the will created a contingent remainder; and Elenore De Lassus, the widow, having never married, and both Felix M. De Lassus, and William A. De Lassus, having pre-deceased her, nothing passed to plaintiff under the will as their representative. Bingham on Descents, 125, 222, 232; 2 Kent Com. 208, note; 2 Bl. Com. 169; 1 Fearne, 9; Olney v. Hull, 21 Pick. 311; Emison v. Whittlesey, 55 Mo. 254; Jones v. Waters, 17 Mo. 587; Aubuchon v. Bender, 44 Mo. 560. Reversed. Opinion by SHERWOOD, C. J.—*De Lassus v. Gatewood.*

CRIMINAL LAW—FELONIOUS ASSAULT—INDICTMENT—EVIDENCE—PRACTICE—CERTIORARI—BILL OF EXCEPTIONS.—1. The indictment charged that the defendant "did, then and there, unlawfully, wilfully and feloniously, with intent to kill, in and upon the body of one Mansfield Trammel, in the peace of the State then and there being, make an assault, and that the said T. J. Van Zant, with a certain knife, which said knife was then and there a dangerous and deadly weapon, likely to do great bodily harm and produce death, and which said knife he, the said T. J. Van Zant, in his hand then and there had and held, then and there unlawfully, wilfully and feloniously did assault, strike, stab, cut, maim, wound and disfigure, and do great bodily harm to him, the said Mansfield Trammel; and so the grand jurors aforesaid, etc., do say, find and present, that the said T. J. Van Zant, him, the said Mansfield Trammel, in the manner and by the means aforesaid, unlawfully, wilfully and feloniously did assault, strike, stab, cut, maim, wound and disfigure, with the intent on the part of him, the said T. J. Van Zant, him, the said Mansfield Trammel, to do great bodily harm and kill, contrary, etc." Defendant moved to quash this indictment for duplicity and repugnancy, and his motion was overruled: *Held*, that while the phraseology of the indictment is not precisely such as would have been employed by an experienced and skilful pleader, it sufficiently charges the offense defined by R. S. § 1264, and is not open to the objections urged against it in the motion to quash. It is not bad for repugnancy, as all the acts charged may have been the result of a single assault, and it is, therefore, plain that the indictment charges but a single offense. State v. Fancher, MS. April term, 11 Cent. L. J., Mo. Ad. No. 6, p. xiv.; Jennings v. State, 9 Mo. 862; Carrico v. State, 11 Mo. 579; State v. Magrath, 19 Mo. 678; State v. Bailey, 21 Mo. 484; State v. Bohannon, 21 Mo. 490. 2. Defendant offered evidence of statements made by himself as to his physical condition previous to and at the time of the offense charged, with a view of showing that he did not bring on the difficulty. His physical condition was fully proven by himself and other witnesses: *Held*, that the trial court committed no error in excluding these statements. 3. The clerk of the circuit court, in answer to a *certiorari*, certified that the original bill of exceptions, on file in his office, did not contain the instructions for the State and defendant embodied in the transcript sent to the Supreme Court. On this, defendant maintained that the cause should be regarded as having been submitted to the jury without instructions: *Held*, that "a transcript filed in this court can not, without the consent of parties, be amended by the certificate of the clerk transmitting the same, that it is imperfect or inaccurate in any designated particular. When a diminution of the record is suggested, and a *certiorari* issued, the entire record as it exists in the court below should be returned to this court. We are of opinion, however, that the statement of the clerk, made in answer to the *certiorari* in this case, is in perfect harmony with the integrity of the transcript before us. It is not essential that the bill of exceptions, when originally filed in the court below, should contain the instructions; it is sufficient if they are therein called for in such manner as to certainly identify them when the clerk comes to perform the duty imposed upon him by section 1030 of the Rev. Stats., of writing said bill out at full length." Affirmed. Opinion by HOUGH, J.—*State v. Van Zant.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

17. The defendant, A, is in custody, and in court, under a charge preferred against him for a felony. At the time an indictment is preferred against him charging him with said felony, and he, failing to find bail, as fixed by the court in said case, before the end of the term thereot, is placed and confined in the common jail, in default thereof. Can the sheriff and jailer in whose custody he is, take and approve a bond for his appearance at the next term of said court, under the laws of Missouri? See secs. 1829, 1830, 1831, 1832, Rev. Stat. 1879.

Milan, Mo. E.

18. A, a native of Scotland, came to Nebraska in 1873, and in the same year declared his intention to become a citizen of the United States. In 1876 he went back to Scotland, intending to change his domicil away from the United States. In 1879 he returned to Nebraska, and ever since has looked upon the United States as his home. Is he entitled to receive his full naturalization papers?

Lincoln, Neb. W. T. H.

19. A, and B, his wife, mortgage their real estate to C. A, alone, executes a second mortgage on the same real estate to C. After proceedings are begun to foreclose both mortgages by C, A conveys the real estate through a trustee to his wife, B. Can the wife, B, claim a homestead, or the $500 in lieu thereof, out of the proceeds of the sale, as against C's second mortgage? J. A. E.

Bucyrus, O.

20. Some years ago one Thompson died, leaving a will devising certain property to his widow, upon condition

that a hotel was to be built upon it, and to be always called the "Thompson House;" and if it should be destroyed by fire, another should be erected in its place, to be also called the "Thompson House." The hotel originally built, pursuant to this condition, acquired an extended reputation among the travelling public, and was well patronized until destroyed by fire some time ago. Its lessees (tenants of Mrs. Thompson) immediately after the fire, occupied another building as a hotel, in the same city, which they named the "Thompson House," and they still occupy it, and call it, and advertise it as the "Thompson House." The reputation acquired by the old hotel was due, no doubt, to the management for many years of these lessees, full as much as to its convenient location. It has now been rebuilt, and leased to other parties, and is again known as the "Thompson House," pursuant to the requirements of the will of Mr. Thompson. Can Mrs. Thompson or her present lessees enjoin the former tenants from continuing the use of the name "Thompson House." upon the building to which they removed?

21. Will a judgment creditor's bill to remove a fraudulent obstruction in the way of his execution lie against one in possession of the property intended to be subjected, where the alleged fraudulent conveyance is inoperative and void? Upon what ground could equity jurisdiction rest in such case? See Freeman on Executions, 426; Bump on Fraud. Conv. 511; Jones v. Green, 1 Wall. 330.

ANSWERS.

9. [11 Cent. L. J. 38.] "The rule of law is, that the beneficial interest undisposed of, results back to the original owner, or to his representatives, real or personal, according to the nature of the property." Adams Eq. III, and cases there cited. R. H. F.

Pensacola, Fla.

14. [11 Cent. L. J. 56.] 1. The children of the purchaser of the land are merely voluntary donees, and not *bona fide* purchasers, etc., and the land in their hands is subject to vendor's lien. Beall v. McGehee, 57 Ala. 438. 2. The death and the insolvency of the purchasers, or of her estate, if, in fact, insolvent, is no defense, and this is so, even although the demand has not been claimed of her estate. Flinn v. Barber, 61 Ala. 532, and cases cited.

Selma, Ala. N.

10. [11 Cent. L. J. 56.] This question presents a point of much nicety, and one which the courts have not clearly settled. A similar question and a very brief answer will be found in 8 Cent. L. J. 120 and 160. Is a judgment obtained by a surety (on a note given for the purchase price of property) against the purchaser, after payment of the note by the surety, a judgment for the "purchase price" of such property? I do not think it is. The question is at least debatable whether such a judgment by the vendor is for the purchase price; whether even he should not declare for the price of the goods, and surrender the note on the trial. Herman says: "The purchase money in the exemption law means the original demand for the property sold, as distinguished from the demand on the security given." Herman on Ex. sec. 138; see, also, Freeman on Ex. sec. 217. It is true, as a general rule, that a surety paying the debt is at once subrogated to all the rights of the principal; and, by the modern rule, to the right to bring an action on any securities held by him. The payment being treated as a purchase and not as an extinguishment. Adams Eq. 527, 528 and notes, 5th Am. ed. But liens for purchase money are generally regarded as personal and not transferable. 1 Paige, 506; 3 Barb. 267; 9 Abb. Pr. 265, 420; Perkins v. Gibson, 24 Am. 644; Hatch v. Spears, 11 Am. 784. The transfer of a note given on the purchase of goods, does not transfer any right of action against the vendee for the "purchase price" of the goods. His (the assignee's) only action is on the note. Carson v. Wallace, 4 Bush. (Ky.) 388; Battle v. Coit, 16 N. Y. 404; 36 Barb. 573; 43 Barb. 340. The surety gets no other right by payment, than to sue his principal upon the note or for money paid; and, except for the strong equities in favor of sureties, it would never have been claimed such a judgment was for the purchase price. It surely is not strictly so, and no more can be said than that, as against the vendee, it represents his liability to pay such price. The strongest case I find is 33 Mich. 96, where it was held that an assignee of a purchase-money note could not, upon a judgment thereon, levy upon property otherwise exempt, as having a claim for the "purchase money." Shepard v. Cross, 33 Mich. 96; *vide*, also, Harley v. Davis, 16 Minn, 487; Davis v. Peabody, 10 Barb. 91; Freeman on Ex. sec. 217. I think this question a very important one, and I trust from others may come further authorities, which I may have overlooked.

Sherburne, N. Y. D. L. A.

8. [11 Cent. L. J. 38.] The author of the question does not say in what State he is supposing his state of facts to arise. Since the statutes of limitation in different States vary widely as to their terms and effect, the same sort of embarrassment arises in attempting to answer it satisfactorily and concisely, as if the query had been: "What formalities are necessary to the valid execution of a deed of real estate?" If the payment had been before the conveyance by mortgagor, and within (at common law and in some States) twenty years before the commencement of the suit, it would bind his assignee and prevent the lapse of time cutting off the remedy of the mortgagee. The assignee of the equity of redemption can stand in no better position than his assignor, and what rights the mortgagee had against the mortgagor, by his having waived the statutes, these he has against the mortgagor's assignee. 9 Wheat. 490; 8 Pa. St. 520; 7 Paige, 465. A mortgage is not properly speaking barred by any statute of limitations. By lapse of time a presumption of payment arises (the equitable analogy to the legal statute of limitations) which may be rebutted by payment on an unequivocal recognition that the mortgage still exists unpaid. 58 Mo. 90; 11 Allen, 584; 26 Maine, 330. Therefore, except in those States where by statute mortgages are expressly barred, as instruments in writing, or governed entirely by the rules affecting the evidence of the debt they secure, as merely an incident thereto, the right of the mortgagee to foreclose depends entirely upon a question of fact: Has the mortgage been paid? If not, he can recover his loan in an action against the property in whosesoever hands he finds it. If the mortgagee can prove that at any time within twenty years before the bringing of the suit, the existence of the debt was recognized, by acts or admissions of the original mortgagor, or any of his assigns, he can recover, unless the mortgagee's right has been distinctly, affirmatively and unequivocally denied. Otherwise, the possession of the mortgagor and his assigns is not adverse to the mortgagee, and will not ripen into a title against him. Accordingly, as there is no question of privity or joint liability, but merely one of fact, has the mortgage been paid or not, the fact that it has not been paid may be proved as well by the admissions of the mortgagor, as by those of the present owner of the equity of redemption; and this is no hardship to the latter, as he had notice of the mortgage, and knew the lien follows the land wherever it goes, until the debt is paid. By reason of the mortgage he has not, most probably, paid full value. The assignee is bound to know that until the debt which the mortgage secures is paid, the land is liable for it. He who finds an unsatisfied mortgage on a piece of property can not rely on any staleness of the claim the record may show, but is thereby upon inquiry, and must find that the same has been paid in fact, or he takes it at his peril. 6 Abb. Pr. (N. S.) 154. Even in those States where the debt is so much the principal thing that the mortgage follows it in all respects, and is barred when the note is barred, and revived when the debt is revived, by payment on the note, or other acknowledgment of its existence. 23 Tex, 563; 2 Kan 384; 28 Ill. 44; 62 Ill. 532; 18 Cal. 482. The acts of the mortgagor, after assignment of the equity of redemption, can not enure to the benefit of the mortgagee, attempting to foreclose the equity, though it may revive as against him (the original mortgagor and maker of the note) his personal liability on the debt. But as against the assignee such acts or admissions of the assignor are not admissible evidence of the existence of the debt. 43 Cal. 185; 18 Kan. 104; 34 Iowa, 380.

Cincinnati, O. J. W.

CURRENT TOPICS.

The question as to the extent to which the courts will go in ordering the production of the originals of telegrams, is yet a mooted one in this country. In England the telegraphs are under the control of the post office department of the Government. Some useful information, says the *Solicitor's Journal*, as to the conditions under which the post office will produce, for judicial or other purposes, the originals of messages sent by telegraph, transpired at the hearing of the application for a summons for libel, in a late case. The judges have always shown great unwillingness to compel the production of these documents. Thus in Taunton Election Petition, 2 O'M. & H. 72-3, Grove, J., said that the matter was one involving a great deal of difficulty on public grounds, and he refrained from giving any decision on the question until he had consulted the other election judges. The unanimous judgment of those judges was that, without expressing a formal decision, the court ought not to interfere to compel the production of telegrams demanded, or even to say anything to the officers of the post office to procure their production. The learned judge added: "I am not by this decision saying that cases might not arise where, upon strong specific grounds being shown, the judge might interpose his authority." The point also arose in The Stroud Election Petition, 2 O'M. & H. 110-112, where Mr. Baron Bramwell said, "I have a strong impression that these documents are in the custody of her majesty, and that you have no right to bring them here, any more than a banker's clerk has a right to bring his master's ledger." The learned judge having been urged by counsel to compel the post office official, who declined to give in the telegram, to produce it, refused to accede to counsel's request, adding, "I will not enforce the production of the telegram by summary proceedings of commitment for contempt of court. I should add, however," he concluded, "to the remarks I have made, that the Crown could always say, 'We think this ought to be done, and we shall raise no objection to its production.'" The result of the proceedings in the case mentioned, would seem to show that the post office authorities have adopted the suggestion of the learned judge, and are now willing to produce these documents (or at all events news telegrams addressed to newspapers) in legal proceedings in which they may judge such production to be necessary. But it appears that they will always require a written authority for production to be furnished, signed either by (1) the sender of the message, or (2) the receiver of the message, or (3), in the case of Ireland, by the Lord Lieutenant. In the recent case, the original message was produced upon a request from the receiver.

In *re Toomes Estate*, decided by the Supreme Court of California in April last, it was held that a Roman Catholic priest, regularly educated and officiating as such, and constantly required by the duties of his office to pass his judgment upon the mental condition of invalids and dying persons, to the end that he may administer the sacraments only to those whose minds are in a proper state to reason or act of their own volition, is an expert as to the sanity of a person. Morrison, C. J., who delivered the opinion of the court said: "Section 1870 of the Code of Civil Procedure reads as follows: 'In conformity with the preceding provision, evidence may be given upon a trial of the following facts: Subdivision 9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art or trade, when he is skilled therein.' It will thus be seen that the provision of the code permitting a witness to give his opinion on a question of science, art or trade, when skilled therein, is but a legislative enactment of a well-settled rule of evidence at common law; 1 Greenlf. on Ev. § 440; 2 Best Ev. §-513; and the inquiry here is, whether it sufficiently appears that the witness Serda was an expert upon the question of mental disease, generally termed insanity." The chief justice then, on the subject of "expert testimony," referred to 56 N. H. 227; 1 Redfield on Wills (4th ed.), 138, 145; 17 N. Y. 340; 35 Vt. 408; 12 Ala. 648. "The foregoing citations are sufficient to establish the general rule on the subject of 'expert' testimony; and now let us apply the rule to the facts of this case. Was the witness Serda an expert on the question of insanity? Was he skilled in the science of mental diseases? A reference to his evidence will answer these questions. He says he was regularly educated in a college of Spain, and had officiated as a priest for ten years; that it was a part of his preparatory education to become competent to pass upon the mental condition of communicants in his church, and for that purpose physiology and psychology were branches of his studies; that previous to his officiating as a priest, it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments; that in every case of the administration of the rites of his church to invalids or dying persons it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of his own volition; that the sacraments could only be administered after such a preliminary examination; and that, therefore, as a priest, he was daily required to exercise and pass his judgment on the mental condition of persons." It has been shown by the authorities already referred to that physicians in general practice who have never made a specialty of the subject of insanity, as well as physicians who are not engaged in the practice of their profession, and also nurses, are deemed experts on this subject; and on what principle or for what reason could the witness Serda be held not to be an expert? It was a part of his collegiate education, and it was specially a matter of daily practice with him for ten years to familiarize himself with the mental condition of persons upon whom he was called on to attend in his character as a priest; and it does seem to us that, from both education and experience, he was peculiarly qualified to express an opinion as an expert on the question of mental disease."

RECENT LEGAL LITERATURE.

GODDARD ON EASEMENTS.

The first edition of this work was issued in England in 1871, the second in 1877. There it has taken a high stand among modern text-books on special topics, Chief Justice Cockburn referring to it in Angus v. Dalton, L. R. 3 Q. B. Div., as a "learned and able treatise." The first American is from the second English edition. The different questions are discussed by Mr. Goddard

---

A Treatise on the Law of Easements. By John Leybourn Goddard, Esq., of the Middle Temple, Barrister at Law. Much enlarged from the second English edition of 1877, by Edmund H. Bennett, LL.D., Professor of Law in the Boston University. Boston: Houghton, Mifflin & Co. 1880.

in the following order: First, the definition and nature of easements. Second, the various modes of acquiring them. Third, the mode and extent of their enjoyment. Fourth, their disturbance and the remedy therefor. Fifth, how they may be lost or extinguished. Each of these topics is treated first generally, and then as it relates to a specific easement—air, light, support, watercourses, and ways. Mr. Bennett, the American editor, has followed the plan of the original work, the added matter being sometimes put in the text, and sometimes in a separate section or chapter. Where the American law differs from the English, the difference is pointed out, and even the more recent English cases are cited by the American editor. The book contains in all about 600 pages.

ABBOTT'S TRIAL EVIDENCE.

Mr. Abbott no doubt had Mr. Roscoe's book in his mind when he planned the present work. That the former has been for many years the constant companion of judge and counsel while on circuit, will be remembered by any one who has ever seen an English judge holding court, and, by his side on his desk, bound in red morocco, with flexible cover, in order that it may be carried about the easier, the compact volume marked "Roscoe's Nisi Prius Evidence." We were present in an English court once while a seduction case was being tried. The proof for the defendant had not proceeded far, before his counsel attempted to introduce evidence showing that the plaintiff had been guilty of acts of immorality with other men. The judge seemed in doubt, but in a moment he had turned to the book at his side, glanced over the pages, and announced his ruling. A little later the proper form of a question as to the reputation for truth of one of the plaintiff's witnesses was in issue, and was settled by the same means. We remember that on the spot we acquired an extraordinary respect for the useful volume at the judge's side, and determined to possess it at our earliest opportunity. But when we had done so, it was at once apparent that it could not serve the same purpose to the American lawyer. All its cases were English, many of its rules were founded on statute, and the only effect of our purchase was to compel a regret that a similar work had not been undertaken for the exclusive use of the American bar. Since then we have been often surprised that while so many topics in the law have been exhausted in special treatises, no author has attempted to give a practical hand book on Evidence which should stand in the same relation to the practitioner as his favorite authority on Practice and Pleading.

But this want which we have regretted is at last filled. We have before us a work which possesses all the merits of the English book and something more. The author points out that the changes in the law which the codes have effected, while abolishing many of the subtleties of pleading, have increased the variety of questions in the law of evidence. Then every class of actions has its peculiar rules of proof, and it is, therefore, not enough to know the general principles of evidence; the successful lawyer must be familiar with the manner in which they apply or do not apply to the case in hand. While the general rules are, in the main, founded on a few principles which are easily remembered and readily applied, the special ones are often technical, resting on exceptions which are easily overlooked. They are likewise so numerous that no memory can be expected to retain them all, and hence an aid of this character is invaluable.

The plan of the work is as follows: It is first divided into three parts, viz.: I. Evidence Affecting Particular Classes of Parties. II. Evidence Affecting Particular Causes of Action. III. Evidence Affecting Particular Defenses. Under each part the chapters all treat of different classes of actions, as for example, under part I., actions by and against assignees (Cap. 1), public officers (Cap. 7), partners (Cap. 9), trustees (Cap. 11). Under part II. actions on contracts of service (Cap. 19), on negotiable paper (Cap. 21), on awards (Cap. 24), for slander or libel (Cap. 43), between vendor and purchaser (Cap. 49), for infringement of trade-marks (Cap. 54); under part III. defenses in abatement (Cap. 58), limitations (Cap. 61), counterclaims (Cap. 63), and so on. How quickly any question in the law of evidence in any particular action may be found, can be seen from this arrangement—we say "any question," because the work contains over 900 pages, and cites no less than 12,000 cases on the topic it treats. It must be admitted that so valuable a book to the practitioner everywhere and in every branch of the law, has not appeared for a long time. It makes no pretension to be more than a digest. It does not claim to be a scientific treatise like that of Best, nor does it treat the subject in the manner of Taylor or Greenleaf. It is not a work for the student. It is not to be read in the study. But it is intended, as we have said, and is exactly fitted, for ready reference in the office and in court.

The Rules of Evidence Applicable on the Trial of Civil Actions. Including both Causes of Action and Defenses. At Common Law in Equity and Under the Codes of Procedure. By Austin Abbott, of the New York Bar. New York: Baker, Voorhis & Co 1880.

NOTES.

——It is said that for the first time in the history of law reporting in Illinois, the official reports keep pace with the opinions.——The report of the Attorney General of Texas shows that for the following eight crimes, murder, theft, arson, perjury, rape, robbery, forgery and burglary, there were in Texas in 1875, 4,515 indictments presented, and 1,177 convictions had, being about one conviction to every four indictments. In 1877 there were 3,130 indictments and 641 convictions, being about one conviction to every five indictments. In 1878 there were 3,548 indictments and 799 convictions, the ratio of convictions to indictments being about the same as during the preceding year. For the year just past there were only 2,942 indictments for these crimes, while there were were 907 convictions, being nearly one conviction for every three indictments.

——A question of importance to employees of corporations was decided in an inferior court in the City of New York last week. The point passed upon was as to the obligation of street-car conductors, under the agreement which most companies require them to sign, that the deposit of twenty-five dollars made by them on entering the service shall be forfeited for neglect of duty or unfaithfulness in its performance. Joseph Riley, an old conductor on the Broadway, Forty-second Street and Grand Street Company's line, was discharged on June 25, 1880. He was paid his full wages, but the officers refused to return the $25, under a plea that the discharged conductor had been detected on June 6, in making a return that was short by five fares. Mr. Riley sued the company for the money. The evidence of the "spotter" who claimed to have detected the thefts was very indefinite. The court therefore gave judgment for the plaintiff.